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No. 85-348 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VAL/DEL, INC.,
A Delaware Corporation,

Petitioner

v.

PASCUA YAQUI TRIBE,
A Putative Indian Tribe, and
THE HONORABLE LILLIAN S. FISHER,
Judge of the Superior Court of the State of Arizona
in and for the County of Pima,

Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION TWO

RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 1978, Congress enacted 25 U.S.C.A. 1300(f), which recognized the Pascua Yaqui Tribe of Indians in Arizona, and made them eligible for certain benefits to Indians. This legislation also directed the Secretary of the Interior to accept in trust, as Indian lands, real property previously conveyed to the Indian Association.

This Tribe of Indians had been in existence for centuries, pre-dating European discovery. Yaqui Indians have resided in what is now the State of Arizona for over 200 years. When Arizona was admitted to Statehood in 1914, Yaqui settlements had existed for over 100 years, in areas known as Tumacacori, and in other areas within what is now the State of Arizona.

By virtue of the enactment of the above legislation, 25 U.S.C. 1300(f) (b) applied the Indian Reorganization Act, 25 U.S.C. 461, et seq., to the Pascua Yaqui Tribe. Further, under 25 U.S.C. 1300(f) (c) Congress applied PL 83-280, 18 U.S.C. 1162, to the Pascua Yaqui Tribe.

The questions presented for review are:

1. Did the enactment of 25 U.S.C. 1300(f) serve to recognize the sovereign status of the Pascua Yaqui Tribe, such that the Tribe would be immune from process and jurisdiction of the Courts of the State of Arizona?

2. Assuming that 25 U.S.C. 1300(f) does recognize the sovereign immunity of the Pascua Yaqui Tribe, was it beyond the authority of Congress to do so, under the powers of Congress to provide for or regulate commerce with Indian Tribes?

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RESPONSE TO PETITION FOR CERTIORARI

Respondent Pascua Yaqui Tribe, respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Court of Appeals of the State of Arizona, Division Two, as to which review has been denied by the Supreme Court of the State of Arizona.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. The Honorable Lillian S. Fisher is a judge of the Superior Court of the State of Arizona, the court of general trial jurisdiction within that State, as to whom

a special Writ was taken to the Court of Appeals of the State of Arizona, by Petitioner Val/Del, Inc., which decision is the subject of this Petition for Certiorari.

Respondent Pascua Yaqui Tribe was the defendant in the court of general jurisdiction, and was the "Real Party In Interest" when the special Writ was taken to the Court of Appeals. Respondent Pascua Yaqui Tribe specifically objects to the captioning in this case by Petitioner Val/Del, Inc., insofar as the Pascua Yaqui Tribe is referred to as a "putative" Indian Tribe. Not only is this designation inconsistent with all pleadings below, but it is an erroneous designation both factually and legally. For this case to be printed or reported under such a caption would be improper, and would be scandalous to the Respondent Pascua Yaqui Tribe. Therefore, the Respondent Pascua Yaqui Tribe requests that the caption in this Court be amended to read "Pascua Yaqui Tribe, an Indian Tribe".

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

25 U.S.C. 1300(f) (b), which was deleted by Petitioner, states:

> "The provisions of Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this Title are extended to such members described in sub-section (a) of this Section."

STATEMENT UNDER RULE 28.4(c)

Petitioner's Statement should be appropriately designated under Rule 28.4(b), as opposed to its current designation under Rule 28.4(c).

STATEMENT OF THE CASE

This case arises out of a lawsuit brought in the Arizona Superior Court by Petitioner Val/Del, Inc. against Respondent Pascua Yaqui Tribe. For purposes of the remainder of this Response to the Petition for Writ of Certiorari, and for convenience and to avoid confusion, Respondent will refer to Petitioner Val/Del, Inc. as "Val/Del", and will refer to Respondent Pascua Yaqui Tribe as "the Tribe".

The background of the case is that, on January 11, 1984, Val/Del and the Tribe entered into a "management agreement" wherein Val/Del was to manage the Yaqui Bingo operation on a fee basis.[1] The introduction of said contract describes the Tribe as "an organized tribe as defined in Section 16 of the Act of June 18, 1934."[2] In the recitals the Tribe is referred to as "Federally Recognized".

This contract had an arbitration clause, Section (12) of which stated:

> "*Arbitration* Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

This contract was not approved by the Secretary of the Interior pursuant to 25 U.S.C. 81.

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[1] Petition for Special Action to Arizona Court of Appeals, Appendix, attachment to Exhibit A.

[2] Indian Reorganization Act, 25 U.S.C. 461, et seq.

On or about June 27, 1984, Val/Del filed a Complaint in the Superior Court of the State of Arizona, in and for the County of Pima, and service was attempted by serving the Tribal Chairman at the Pascua Yaqui Indian Reservation.

The Tribe filed a Motion to Dismiss under Rule 12(b), Arizona Rules of Civil Procedure, alleging jurisdictional grounds and insufficiency of service of process. The basis of the Motion was tribal sovereignty.

Val/Del responded by alleging that the Tribe did not deserve sovereign status. It argued three alternative theories: (a) that 25 U.S.C. 1300(f) provided that Arizona shall exercise criminal and civil jurisdiction, and no effective retrocession of the State's jurisdiction had been accepted by the federal government; (b) that the Pascua Yaquis were not sovereign, since they were not indigenous to Arizona, they had no "political" organization and they do not otherwise meet the guidelines under 25 CFR, Part 83, "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe"; and (c) that the Tribe waived its immunity by virtue of the arbitration clause in the contract.

In its second argument presented above, Val/Del presented extrinsic evidence in the form of an exhibit. That exhibit was a photocopy of pages 4-9 and pages 146-173 of "Pascua, A Yaqui Village in Arizona", by Edward H. Spicer.[3] This exhibit was attached to the pleadings without accompanying affidavit, foundation,

[3] From this point on the Tribe will use the abbreviations "Spicer I" and "Spicer II" as set forth in footnote 6 of Val/Del's Petition for Certiorari.

or explanation, and was relied upon by Val/Del as a factual basis for arguing that the Tribe should not have been recognized as a Tribe by Congress.[4]

In reply the Tribe pointed out, among other things, that the use of the Spicer publication was questionable, and could certainly not be used to overrule Congressional mandate. Further, the Tribe argued that *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983) (relied upon by Val/Del for the proposition that an arbitration clause waived sovereign immunity) was distinguishable on the basis that the instant arbitration clause was contained within a void contract (because not approved by the Secretary of the Interior) and that the instant arbitration clause was therefore void.

The Superior Court granted the Motion to Dismiss. There is no indication that the Court gave any credence to Val/Del's exhibits of "historical fact".[5]

Val/Del filed a special Writ to the Court of Appeals of the State of Arizona, Division Two. Then, for the first time, Val/Del attached an affidavit along with two complete volumes of literature (Spicer I and II), in an attempt to support its earlier allegation that the Tribe should not be recognized as a Tribe.[6] The affidavit, from a colleague of Dr. Spicer, was apparently intended to raise these two books to the level of facts capable of

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[4] See Petition for Special Action to the Court of Appeals, Appendix, attachment to Exhibit E.

[5] See Petition for Special Action, Appendix Exhibit H, for the trial court's Minute Orders.

[6] Petition for Special Action, Appendix Exhibits L, M and N.

being judicially noticed under Rule 201(b), Arizona Rules of Evidence. This was, of course, not properly placed before the Superior Court in order for it to have taken judicial notice of these facts. See *State v. Maguire*, 124 Ariz. 64, 601 P.2d 1348 (App. 1978). The Tribe objected to the use of these books,[7] since they were not appropriately before the Trial or Appellate Courts.

In its opinion, the Court of Appeals of the State of Arizona essentially entered two rulings: (a) finding that the Tribe, as a federally recognized tribe, is entitled to sovereign immunity; and (b) finding, under *Native Village of Eyak v. GC Contractors, supra*, that the Tribe had waived its immunity by virtue of the arbitration clause in the agreement.

Both parties filed motions for rehearing to the Court of Appeals, and petitions for review to the Supreme Court of the State of Arizona. Both petitions for review were denied on May 30, 1985.

In its Statement of the Case, Val/Del has reviewed in depth the "history" of the Yaquis, by reference to Spicer I and II. (pages 8-20 of the Petition for Certiorari). The Tribe takes issue with the use of these volumes in general, since they were not properly before the lower court. However, the Tribe will dispute these sources, and the use thereof, in later argument as opposed to addressing them in the Statement of the Case.

REASONS FOR DENYING THE WRIT

There are no special or important reasons for grant-

[7] Response to Petition for Special Action to the Court of Appeals, p. 5.

ing certiorari in this case, within the meaning of Rule 17, Supreme Court Rules ("Considerations Governing Review on Certiorari"). Val/Del characterizes this case as one of "fundamental importance" to the State of Arizona, and more importantly to the citizens living in the Tucson area. In actuality, this is a singular dispute between two parties regarding a private contract. What Val/Del is really concerned about is that it now realizes that the decision of the Court below did not affect the "trust status" of the Pascua Yaqui Reservation where the bingo game was located. Therefore, assuming that Val/Del could eventually prevail on the merits, no valid execution could ever issue to enforce a damages award.

Val/Del has therefore suggested that the current decision below affords it "incomplete relief", and it wants this high court to intervene.

Val/Del stands before this Court as a litigant which chose to enrich itself by engaging in commercial activities on an Indian Reservation, acknowledging the Pascua Yaqui Tribe as a recognized Tribe of Indians exempt from State regulation. It is this exemption which makes these particular activities so lucrative. Indeed, Val/Del's Complaint in this case sought a preliminary and permanent order of specific performance authorizing it to continue operating under the agreement. In light of the passage of time and the fact that no such equitable relief was granted, Val/Del now seeks to ignore its previous recognition of the Tribe's status so that it can "execute against the reservation." Obvious elements of estoppel apply to Val/Del's inconsistent positions throughout this case.

Courts have historically refused to involve them-

selves with the relationship between concepts of waiver of sovereign immunity and the ability of creditors to attach or garnish assets. See *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community,* 138 Ariz. 378, 674 P.2d 1376 (App. 1983); *Maryland Casualty Co. v. Citizens National Bank,* 361 F.2d 517, cert. denied 385 U.S. 918 (1966). This is a recognized risk which parties take when dealing with tribes, and these parties may avoid the problem by asking tribes to pledge specific assets to the venture. Val/Del did not do so.

Further, Val/Del assumes that a ruling that the Pascua Yaqui Tribe is not sovereign would somehow subject these federal trust lands to payment of the debt. There is no authority for this proposition, and there is therefore no realistic remedy for Val/Del even if this Court ruled in its favor.

Besides the clear policy considerations for denying the Writ, Val/Del's entire argument is without legal or factual merit. The Tribe will address the two basic issues below:

I

CONGRESS INTENDED TO RECOGNIZE THE SOVEREIGNTY OF THE PASCUA YAQUI TRIBE

The first issue presented is whether, in enacting 25 U.S.C. 1300(f), Congress intended to recognize the sovereignty of the Pascua Yaqui Tribe.

Of course, Val/Del argues that this legislation merely intended to confer welfare benefits on the Tribe, and that no intent to recognize a sovereign Tribe existed.

Val/Del's convenient argument ignores the plain meaning of the legislation. Further, the legislative history and circumstantial context of the legislation confirm this plain meaning – Congress definitely intended to recognize the Pascua Yaqui Tribe for all purposes.

Certainly, subsection (a) of 25 U.S.C. 1300(f) could arguably be said to only confer benefits (even though the terminology "because of their status as Indians" is persuasive to the contrary).

However, subsections (b) and (c) are clear recognitions of tribal sovereignty when taken in the context of the other legislation to which they specifically apply.

Subsection (b) applies the Indian Reorganization Act to the Pascua Yaqui Tribe.[8] This act *only* applies to "any Indian Tribe, or tribes, residing on the same reservation". See generally, Cohen, Handbook of Federal Indian Law, 1982 Ed., Ch. 1, Sec. B(2) (e).

Subsection (c) applies PL-280[9], which only applies to Indian Tribes, to the relationship between the State of Arizona and the Tribe. This authorized the State of Arizona to accept jurisdiction over the Tribal lands or retrocede. Arizona retroceded. The federal government accepted that retrocession on August 14, 1985, as published at FR Doc. 85-20352 Filed 8-23-85.[10]

The legislative history and circumstantial context of this legislation show clearly that Congressional rec-

[8] 25 U.S.C. 461, et seq.

[9] 18 U.S.C. 1162.

[10] This retrocession was not complete when this lawsuit began. See footnote 2 of Court of Appeals Opinion.

ognition was intended, as derived from the Hearing before the U.S. Senate Select Committee on Indian Affairs on S.1633 on September 27, 1977, (hereinafter "Hearing S.1633"), the Report from the Senate Select Committee on Indian Affairs, No. 95-719 dated March 22, 1978, (hereinafter "Rep. No. 95-719"), the Report from the House Committee on Interior and Insular Affairs No. 95-1021 dated March 30, 1978, (hereinafter "Rep. No. 95-1021"), and the Report from the Conference on Disagreeing Votes, Rep. No. 95-1339 dated July 11, 1978, (hereinafter "Rep. No. 95-1339").

As initially stated by Sen. James Abourezk, Chairman, Select Committee on Indian Affairs,

> "The purpose of this hearing before the Senate Select Committee on Indian Affairs this morning is to take testimony on a bill, S.1633, which would extend recognition to the Pascua Yaqui Band of Indians in Arizona. The Yaqui people have lived in an area including what is now the southwestern United States and Northern Mexico since time immemorial."
>
> Opening statement of Senator James Abourezk, Hearing S.1633, Page 1.

Clearly, the analysis of the legislation shows that the initial Senate proposal extended Congressional recognition to the Tribe, directed the Secretary of the Interior to accept the land in trust which had been conveyed to the Pascua Yaqui Association by Act of Congress in 1964, and repealed Section (4) of the Act of October 8, 1964, which had prevented the Tribe from being eligible for certain benefits, services and assistance provided to Indians. See Rep. 95-719 "Purpose of the Measure", Page 2.

However, the House of Representatives Committee on Interior and Insular Affairs submitted H.R.6612, which would have provided for the extension of Federal benefits, but would not have conferred overall Congressional recognition to the Tribe. See Rep. 95-1021, "Purpose", Page 2.

The Committee of Conference on the Disagreeing Votes of the two Houses (on the Amendments of the House to S.1633) created a compromise. The ultimate legislation, as we now see it enacted under 25 U.S.C. 1300(f), is explained in Rep. No. 95-1339, at Pages 3 and 4. After discussing the initial proposal and the House Amendment, the Joint Explanatory Statement of the Committee of Conference reported as follows:

> "The Conference Committee adopted a substitute, by way of compromise. The House agreed to accept the Senate provision with respect to tribal self-government and reservation status. On the question of jurisdiction, the Senate agreed that the State should continue to exercise criminal and civil jurisdiction on the Pascua Yaqui Reservation lands as if such jurisdiction had been assumed under Public Law 83-280. Public Law 83-280 authorizes a State to exercise comprehensive civil and criminal jurisdiction over Indian Reservations within State boundaries, with specified protections for the trust nature of the land. The State may, at its option, retrocede jurisdiction to the Federal Government on a complete or partial basis by action of the State Legislature."

Based upon the foregoing, there can be no doubt that Congress intended to recognize the Pascua Yaqui Tribe as a sovereign Tribe of Indians.

II

THE ENACTMENT OF 25 U.S.C. 1300(f) WAS NOT BEYOND THE POWERS OF CONGRESS UNDER THE INDIAN COMMERCE CLAUSE

Val/Del argues that any recognition of the Pascua Yaqui Tribe by Congress is unconstitutional under the Indian Commerce Clause, Article I, Section 8 of the Constitution. This clause gives Congress the power to regulate commerce with the Indian tribes. Val/Del contends that the Tribe is not a "Tribe of Indians", and that therefore Congress did not have the authority to deal with the Tribe as an Indian Tribe.

The Tribe's response to Val/Del's argument is twofold: (1) Congressional authority in this field is plenary, the question constituting a political question; (2) If this political question may be reviewed by the Courts, the applicable standard for review is "arbitrariness", a standard which has not yet been defined. However, under any definition of arbitrariness the Congressional Act will stand, since the Pascua Yaqui Indian Tribe has long been recognized as such. The evidence before Congress overwhelmingly supports this conclusion. The authorities cited by Val/Del (Spicer I and Spicer II) were never properly brought before the Arizona Superior Court or the Arizona Court of Appeals. However, if this Court wishes to review those authorities, there is ample evidence contained therein to support the fact that the Pascua Yaqui Tribe was properly recognized as a Tribe of Indians.

1. Congressional Authority Plenary; Political Question.

When Congress has found that a Tribe exists, Courts have not disturbed such determinations. Some of the

older cases have characterized such determinations as political questions, outside the scope of judicial review. See generally *Baker v. Carr,* 369 U.S. 186 (1962); *United States v. Rickert,* 188 U.S. 432 (1903); *United States v. Holliday,* 70 U.S. 407 (1866). No Congressional determination of tribal status has been overturned by the Courts. In light of this, Val/Del relies upon the suggestion that there was a limit on Congress' power to define tribal status, contained in *United States v. Sandoval,* 231 U.S. 28 (1913), in the following passage:

> "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian Tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, not by the courts."
> *Sandoval, supra,* 231 U.S. at 46.

The Supreme Court has never defined the "arbitrariness" standard referred to in *Sandoval, supra.* As such the Tribe contends that, in the absence of specific guidelines, the matter is still a political question and is non-justiciable.

2. If Congressional Authority May Be Reviewed, Then The Congressional Decision Was Not Arbitrary.

As stated before, the Courts have not specifically defined the "arbitrariness" standard referred to in *Sandoval, supra.* However, some guidance on this issue is set forth in *The Kansas Indians,* 72 U.S. 737 (1867) which leads to the conclusion that the only practical limitations upon Congressional and Executive decisions

as to tribal existence are the broad requirements that the tribal organization present a "people distinct from others" and that the United States "recognizes their national character". *The Kansas Indians, supra,* 72 U.S. at 755-57.

Assuming that Congressional recognition may be reviewed and set aside if it is "arbitrary", then it is appropriate to review the action taken by Congress in recognizing the Tribe, in light of the available evidence before it. When this is done, it is clear that Congress did not act arbitrarily.

As this Court is well aware, Val/Del has, throughout the history of this litigation, gone to great lengths to quote from two texts by Edward Spicer (referred to as Spicer I and II), for the proposition that the Tribe does not constitute a group entitled to Tribal status. Interestingly enough, Dr. Spicer testified before the Senate Select Committee on Indian Affairs, by virtue of a letter directed to Senator James Abourezk dated September 21, 1977. This letter is presented in its entirety in the transcript of that hearing, at Pages 11 and 12. Dr. Spicer stated the following:

> "I have been associated with the Yaqui people for a period of 40 years. I have lived in their communities for long periods of time. Based on my studies of their history and culture, I have published several books and articles concerning the Yaqui people. A list of my major publications as well as my employment history, my various awards and my professional activities is attached as Exhibit "A".
>
> *One conclusion of my long and extensive study of Yaqui people is that they form a distinct*

Indian group or Tribe. The language their ancestors spoke, and the present day Pascua Yaquis continue to speak is universally classified by linguists as a member of the Uto-Aztecan family of languages to which also belong the languages of the ancient and modern Aztecs, and the Papagos, Pimas, Hopis, and Paiutes of Arizona. This is one of the most widespread and important of North American Indian language stocks. The Yaqui language, as a member of this group, has its own distinctive Indian grammar and sound system wholly unrelated to any language in any part of the world outside of North America. The present day Yaquis including those of New Pascua Pueblo in Arizona speak this same language.

Yaquis have resided in Arizona for more than 200 years. They had a role in the development of the area now known as Arizona ever since the 1700's. Some Yaquis came with the followers of Father Kino to the first missions established in the Upper Santa Cruz Valley. There is documentary record of Yaquis residing in what is now Southern Arizona at Tumacacori in 1796.

During the late 19th century the Yaqui residents of the State of Sonora in Mexico were faced with the determined efforts of the large land owners to divest the Yaquis of their rich home lands. But the Yaquis resisted such efforts effectively for some 50 years. It was not until Mexican Federal troops intervened on the side of the large land owners in the 1880's that the Yaqui resistance was crushed. At this time Yaquis began coming to the United States to escape the unbearable political and cultural oppression. The Yaquis settled in permanent villages near Tucson and Tempe, Arizona. The

United States government admitted these Yaquis as political refugees.

By 1930, there were approximately 2,500 Yaquis in Arizona living in seven settlements including four near Tucson. The history and culture of these villages are described in my book, *Pascua: A Yaqui Village in Arizona,* University of Chicago Press, 1940. Since 1930, the Yaqui population in the state increased to between 5,000 and 6,000, the entire increase being due to the natural growth of the original Yaquis' families.

The Native Indian language continues to be spoken by the Yaquis in Arizona. The distinct Yaqui customs which have been uniquely their own since before the time of European discovery continue to shape and influence their way of life. This central core of Yaqui culture is highly prized by the Yaquis and has been maintained through the whole course of their unique and difficult historical experience."

Hearing, S.1633, P. 11-12 (emphasis added)

In the report from the Select Committee on Indian Affairs, the Committee recognized that the Yaquis are descendants of the ancient Toltecs who ranged from what is now the city of Durango, north to Southern Colorado and west to California. Rep. No. 95-719, Page 3.

The nature of the Yaqui government and culture were explained in detail by Anselmo Valencia, then Director, Pascua Yaqui Association. Hearing S.1633, Pages 5 and 6. Mr. Valencia explained the nine member Tribal Council, which consisted of a Tribal Chairman, Vice-Chairman, Secretary, and Board members. Fur-

ther, he testified that the Yaquis were Indians in every sense of the word, that they had their own language, and their own culture (exemplified by the Pascola Dancing, the Deer Dancing, and the Coyote Dancing, which are Indian in origin). He testified that in the Deer Dance, the Tribesmen sing to honor the great mountains, the springs, the lakes. They sing of their father, the Sun, and of creatures living and dead. They sing of trees and leaves and twigs. They sing of the birds in the sky and of the fish in the ocean. Their drummers play their music on their drums and flutes.

Mr. Valencia closed this portion of his testimony with an interesting analysis of the combination of the Yaqui culture and the Catholic faith.

> "All of the songs sung and played are to the olden times-ancient Yaqui Indian stories. We have also the more modern cultural dances, such as the Matachini and Chapayecks Dances, which we have practiced for over 400 years. We could have been Mormons, Baptists, or any other denomination, and we would still have retained our Indian culture. It just so happened that the so-called conquerors were of the Catholic faith. The Catholic faith and the various governments under which the Yaquis have had to suffer have tried for centuries to undermine our "Yaquiness", but after 400 years they have not succeeded. We have retained our language, our cultural and our Indianness."
>
> Hearing S-1633, Page 6.

The above evidence, as well as all other matters before the Congress, clearly proved that this Tribe signified a unique culture, distinct from any other, which was Indian in nature and which descended from

other ancient tribes traveling throughout the Southwestern United States, ultimately settling in Mexico and Southern Arizona. Congressional recognition was certainly not arbitrary.

Val/Del has also relied upon the "standards" applicable under the Code of Federal Regulations, indicating that Congress did not appropriately apply those regulations in determining whether the Pascua Yaqui Tribe should deserve federal recognition. This argument is totally misplaced, since the regulations were not even in existence at the time of the enactment of 25 U.S.C. 1300(f). See Rep. No. 95-719, P.7. Further, the regulations apply to the Bureau of Indian Affairs, not to Congress.

This leaves Val/Del's references to Spicer I and II as the only authority for non-recognition.

Throughout the course of this litigation, the Tribe has objected to this use of Spicer I and Spicer II. Initially, Val/Del inappropriately attached exhibits to its Response to the Motion to Dismiss before the trial court. In Arizona, a party seeking to introduce extrinsic facts in either supporting or opposing a Rule 12(b) motion shall do so by affidavit. If the court chooses *not* to exclude these affidavits, then the matter is treated as a motion for summary judgment under Rule 56, Arizona Rules of Civil Procedure. *Payne v. Penzoil Corp.*, 138 Ariz. 52, 672 P.2d 1322 (App. 1983). Under Rule 56, summary judgment is permissible only if supported by facts which would be otherwise admissible in evidence, *Mason v. Bulleri*, 25 Ariz. App. 357, 543 P.2d 478 (App. 1975), and the court shall exclude from its consideration any inadmissible evidence. *State ex rel Corbin v. Sabel*,

138 Ariz. 253, 674 P.2d 316 (App. 1983). The court may not take cognizance of positions regarding facts based upon exhibits which are merely parts of briefs and have not been otherwise verified or supported. *Borbon v. City of Tucson*, 27 Ariz. App. 550, 556 P.2d 1153 (App. 1976). These unsupported facts may not be considered, even if they are uncontroverted by the opponent. *Borbon, supra*, 556 P.2d at 1154.

Therefore, there is no question that the trial court should not have considered any of the facts set forth in Val/Del's "extrinsic evidence". It is apparent that the court did not consider these facts, by review of the Minute Entry denying the Motion to Dismiss. Further, any reference to these facts in the Court of Appeals decision is dicta, since the facts were unnecessary to the determinations made by that court.

If, however, this Court decides that the facts set forth in Val/Del's Petition should be considered, then the Tribe refers this Court to ample evidence contained within those volumes which contradicts Val/Del's position and supports the argument that the Congressional decision was not arbitrary. In so doing, however, the Tribe does not agree to the use of these exhibits or waive any further rights to object to these exhibits.

Val/Del's reliance on Spicer I and Spicer II, as authority for the proposition that Congress acted in excess of its power in recognizing Yaqui sovereignty, is quite misplaced. Val/Del has taken convenient bits and pieces from the context of Spicer's anthropolgical study of a distinct tribe and from these bits and pieces has drawn the conclusion that the tribe does not exist. Spicer most certainly never made this conclusion, as is clear from his testimony before Congress in 1977.

Val/Del maintains that the Pascua Yaqui Tribe of Arizona has never had any of the attributes of a sovereign nation and, that therefore it has no claim to sovereign immunity as part of a heritage which predates Congressional recognition. Val/Del claims that the Yaqui lack cultural integrity, being "integrated more by religion than anything else" (Petition for Certiorari, Page 20), that the Yaqui in Arizona have never had "any semblance of self-government" (Petition for Certiorari, Page 20) and that the Yaqui are not indigenous to Arizona. These claims are patently erroneous.

Spicer first undertook his study of the Yaqui Village of Pascua in the late 1930's. At this time the Yaqui society was suffering the effect of substantial relocation of its people brought about by encroachment on its lands by the Mexican government. (Spicer I, 19)

The Yaquis had lived in Arizona for many generations, having been listed among the residents of Tumacacori Mission in a 1796 census, but the most recent major immigration from Mexico had occurred in the years 1900 to 1910. (Spicer II, 236, 237) Although the Yaquis had developed organized communities in the Tucson and Phoenix areas by 1909, when Spicer first encountered the Tribe it was undergoing changes which necessarily accompany rapid assimilation to new conditions. (Spicer II, 242). Yet at this time of the Tribe's greatest cultural suppression, Spicer had no difficulty in identifying the Yaqui as a discrete group for study. Spicer's interest in the Yaquis' ability to maintain their cultural integrity distinct from the Mexican population surrounding them in their United States community was what initially led him to Pascua. Spicer noted that the Tribe's adaptation to the United States had not resulted

in any breakdown of cultural organization among the Yaqui. (Spicer I, xviii) Throughout his work Spicer refers to the Pascua Yaqui as "Yaqui Indians", as members of the "Yaqui Tribe", and as an "enduring people" with a unique identity. (Spicer I, 4, 18; Spicer II, Chs. 6 and 7). Spicer states:

> "The Yaquis who spun off into the United States from the mainstream of Yaqui development — did not disappear from Yaqui history. They neither melted into the society of Arizona by losing their identity nor returned to the homeland . . . instead they founded new settlements which became vigorous communities influencing Sonoran Yaquis in many ways and bearing a variant stream of Yaqui tradition."
> Spicer II, 235-236.

The Yaquis speak their own language, which Spicer identifies as Uto-Aztecan language which "has existed continuously for 350 years and probably much longer". (Spicer I, 8; Spicer II, 289) While Spanish influence is evident in many Yaqui words, the Yaqui language remains distinct from the Spanish language.

> "The Yaqui spoken in 1970 could probably be understood by a Yaqui Indian of 1600 or 1700, provided he or she listened to it for some weeks and became familiar with the minor sound shifts and the tremendous number of new words incorporated since the 16th Century."
> Spicer II, 290

Obviously, the Yaqui language is an important cultural unifier totally ignored by Petitioner.

Another unifying element in Yaqui culture, as in

many cultures, is their religion. It is characterized by a cycle of ceremonies and dances which are organized by ceremonial societies and which combine ancient aboriginal religion with the unique expression of Christian concepts introduced since the 16th Century. This religion is very important to the Yaqui. (Spicer II, Ch, 2) Yet to say that the Yaqui are integrated more by religion than anything else is to ignore all of the additional elements which comprise a common lifeway and which are uniquely expressed by the Yaqui Tribe. These include the Yaqui kinship system, the ceremonial societies (serving important economic and social functions as well as ritual ones), a shared system of values and a cultural history which has survived the generations and is well known to them today (as detailed in Spicer II).

The Yaqui are undeniably a distinct tribe of American Indians unified by a common language, religion, social structure, and cultural history. They are as deserving of recognition as a sovereign entity as any North American Indian Tribe recognized by Congress.

The Yaqui have always maintained self-government. While the cultural suppression which occurred during the late 19th and early 20th centuries resulted in some disruption of traditional Yaqui leadership as it had been manifested in earlier periods, the Yaqui communities of Arizona have at all times maintained internal control. Spicer detailed the system of leadership within the community of Pascua during the period he first contacted the Tribe as a combination of the civil and religious realms of authority. Leaders of the Fariseo and of the Matachin societies were the recognized village leaders at alternate seasons of the year. (Spicer I, 146, 147)

Therefore, even Val/Del's factual sources lead to the conclusion that the Tribe was properly recognized.

Despite the fact that neither the statutes, the regulations nor the case law require that an Indian Tribe be indiginous to the United States or to its reservation lands for Congressional recognition, Val/Del repeatedly has asserted that the Yaqui are recent immigrants to the United States. Not only is this irrelevant based upon the status of the law, but it is clearly in conflict with the evidence. In seizing upon specific instances of cultural change and disruption to argue that the Pascua Yaquis are not now a tribe, Val/Del ignores the similar histories of most federally recognized tribes who have been subjected to uprootings, transplantations and rapid readjustments, which have been commonplace throughout the United States. Congress did not act arbitrarily in recognizing the Pascua Yaqui Indian Tribe as sovereign. To characterize this recognition as "manifestly unauthorized exercise of power" such as calling the Irish or Haitian immigrants American Indians, is ridiculous.

CONCLUSION

In conclusion, Congress intended to recognize the sovereignty of the Pascua Yaqui Indian Tribe in enacting 25 U.S.C. 1300(f). Congress did not act "arbitrarily" in making this recognition. The evidence before Congress, as well as the inadmissible extrinsic materials presented by Val/Del prove clearly that Congress correctly recognized the long-standing Tribal status of the Yaqui people.

The Petition for Certiorari should therefore be denied.

DATED this 16th day of September, 1985.

LANSDALE & KNEIP, P.C.

By Gary S. Kneip
GARY S. KNEIP
Attorneys for Respondent
PASCUA YAQUI TRIBE

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

GARY S. KNEIP, being first duly sworn, upon his oath, deposes and says:

That in accordance with Rule 28.2, United States Supreme Court Rules, he has deposited this 26th day of September, 1985, in a United States Post Office, with first class postage prepaid, and properly addressed to the clerk of this Court, within the time allowed for filing, 40 copies of Pascua Yaqui Tribe, Real Party in Interest, Response to Petition for Certiorari.

Further, he has deposited this 26th day of September, 1985, in a United States Post Office, with first class postage prepaid, two copies of said Response to Petition for Certiorari properly addressed to the attorney for the Petitioner herein.

Gary S. Kneip

GARY S. KNEIP

SUBSCRIBED AND SWORN to before me this 26th day of September, 1985, by GARY S. KNEIP.

Notary Public

My Commission Expires:
10-19-87